

SUPREME COURT OF APPEALS OF WEST VIRGINIA

KASSERMAN AND BOWMAN, PLLC,

APPELLANT,

v.

Supreme Court No.: 34140

Kanawha County Civil Action No.: 05-C-1363

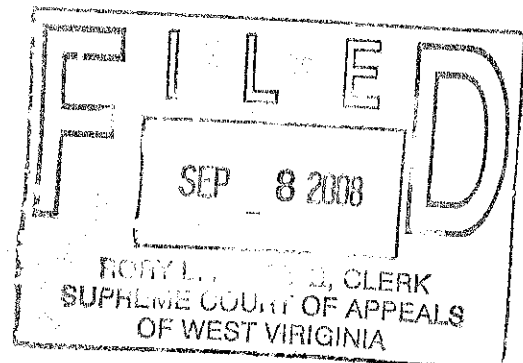
JANE L. CLINE,

APPELLEE.

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

I. INTRODUCTION

The former law firm of Seibert & Kasserman, LC ("SK")², filed a Petition for Declaratory Relief on June 20, 2005, in Kanawha Circuit Court against Jane L. Cline³, the West Virginia Insurance Commissioner ("WVIC"). The purpose of this declaratory action was to obtain a judicial determination as to whether West Virginia Code § 23-5-16 permitted a twenty percent (20%) contingency fee to be awarded upon the settlement of medical benefits in a Workers' Compensation claim⁴.

¹The former law firm of Kasserman and Bowman, PLLC ("KB") ceased operations in 2008. The former partners of KB, Ronald William Kasserman, Esq., and Jonathan Clark Bowman, Esq., continue to share office space, but no longer work together in the former KB partnership. Mr. Bowman now operates the entity Bowman Law Office ("BLO") and was the attorney responsible for bringing the initial action on behalf of KB. BLO requests that it be permitted to proceed as the Appellant in this proceeding and will bring a former motion to substitute if this Court deems such necessary.

²KB was later permitted to substitute as the plaintiff party in this proceeding around the same time that SK was dissolved (see footnote 3 below).

³Initially other parties were listed as respondents, but during the pending action all of those parties, other than the remaining respondent, have been dismissed voluntarily.

⁴SK had stated in its initial pleading that it had represented West Virginia workers' compensation claimants who have been granted permanent total disability ("PTD") awards at some agency level, and have later pursued and have successfully obtained earlier onset dates for PTD awards through either via litigation before the Workers' Compensation Office of Judges, or an appeal to either the Workers' Compensation Board of Review or before the West Virginia Supreme Court of Appeals, after the prior determination of PTD entitlement and the award of benefits from that determination. SK had also stated in its initial pleading that it had deducted the amount of twenty percent (20%) of the PTD benefits obtained as a result of successfully obtaining an earlier onset date on behalf of said claimant, and was holding the same in escrow pending a determination of the propriety of such fee. SK was seeking a determination as to whether it could obtain an attorney fee of twenty percent (20%) based upon additional PTD benefits awarded for an earlier on date as a result of litigation or appeals on behalf of a claimant for the statutory maximum period of 208 weeks per award. However, SK released all of said funds to all claimants prior to its dissolution on March 31, 2006. KB had advised the Circuit Court that it no longer had any funds held in escrow pertaining to PTD benefits obtained as a result of successfully obtaining an earlier onset date on behalf of said claimants and that did not include this issue in its Motion for Summary Judgement to the Circuit Court. Nevertheless, while KB's motion for summary judgment was pending before the Circuit Court, a client of KB was awarded for an earlier on date as a result of litigation on behalf of that claimant so the issue still needs addressed.

A Petition for Appeal was filed by KB to the Final Order dated October 17, 2007 (Exhibit 1), from the Circuit Court of Kanawha County, which found West Virginia Code § 23-5-16 does not permit a twenty percent (20%) contingency fee to be awarded upon the settlement of medical benefits in a Workers' Compensation claim.

On May 22, 2008, this Court accepted KB's Petition for Appeal.

II. STATEMENT OF FACTS

BLO is a law firm comprised of one attorney, Jonathan Clark Bowman, Esquire, licensed to practice law in the State of West Virginia with West Virginia State Bar ID number 7129. BLO, which represents hundreds of West Virginia workers' compensation claimants, has negotiated and settled on a full and final basis many cases for indemnity benefits only, and more recently (see below) for indemnity and medical benefits (the WVIC is privy to said information inasmuch as it statutorily regulates all workers' compensation claims in the State of West Virginia).

Beginning in 2003, the West Virginia Legislature provided the means for parties to West Virginia workers' compensation claims to settle issues involving indemnity and medical benefits (prior to 2003, medical treatment issues were never part of the settlement process). Legislation and regulations have been created to provide parties guidance as far as issues that can be settled, parties to a settlement, the procedure for settlement, etc. However, no place in these new laws and rules is there any provision as to whether attorneys representing claimants in West Virginia workers' compensation proceedings can charge a twenty percent (20%) contingency fee based upon the procurement of a settlement of claims for medical benefits (whether it be in addition to or in lieu of a settlement of the claim for indemnity benefits). Presumably parties are to turn to West Virginia Code § 23-5-16 for guidance on this issue.

In 2003, Attorney Bowman, while employed by the law firm of SK, along with his former law partner, M. Jane Glauser, Esq., requested an ethics opinion from the Office of Disciplinary Counsel ("ODC") as to whether an attorney could charge a twenty percent (20%) fee (not to exceed the maximum statutory period of 208 weeks) on the additional PTD benefits granted and paid due to litigation or appeals after an initial determination was made awarding PTD benefits. An informal advisory opinion was issued by the ODC on March 27, 2003 (Exhibit 2), stating that "one could conclude that the additional award obtained by litigation of the onset date issue could be considered the full litigation of a new case" and, in essence, advised that an additional attorneys' fee could be

charged, keeping in mind Rule 1.5(a) of the West Virginia Rules of Professional Conduct.

In 2004, Attorney Bowman, while still employed by the law firm of SK, along with Attorney Glauser, requested an ethics opinion from the ODC as to whether an attorney could charge a twenty percent (20%) fee for the maximum statutory period of 208 weeks based upon the amount of the settlement of medical benefits. An informal advisory opinion was issued by the ODC on June 30, 2004 (Exhibit 3), that it did not believe the statute permitted such a fee.

SK, realizing that it would ultimately need a judicial determination as to these issues, commenced the instant declaratory action. However, before a final judicial determination could be rendered, SK dissolved and KB became the substituted plaintiff in this action.

It is important to note here that while this action has been pending, KB had deducted the amount of twenty percent (20%) of the total amount paid as a lump sum to claimants they have represented for settling their claims for medical benefits. Said amounts have been held in escrow pending a judicial determination of the propriety of such fee. Additionally, KB had deducted a twenty percent (20%) amount (not exceeding the statutory maximum period of 208 weeks) of the total additional PTD benefits paid solely as a result of litigation before the Office of Judges. Again, said amount has been held in escrow pending a judicial determination of the propriety of such fee.

It is also important to note here that at this time, all clients with such escrow accounts have provided written consent for this, provided that (1) no fee will be taken until final judicial determination; and (2) if the final judicial determination is not consistent with BLO's position, all monies, including interest earned, would be distributed to each client.

III. ARGUMENT

West Virginia Code § 23-5-16 provides:

No attorney's fee in excess of twenty percent of any award granted shall be charged or received by an attorney for a claimant or dependent. In no case shall the fee received by the attorney of such claimant or dependent be in excess of twenty percent of the benefits to be paid during a period of two hundred eight weeks. The interest on disability or dependent benefits as provided for in this chapter shall not be considered as part of the award in determining any such attorney's fee. However, any contract entered into in excess of twenty percent of the benefits to be paid during a period of two hundred eight weeks, as herein provided, shall be unlawful and unenforceable as contrary to the public policy of this state and any fee charged or received by an attorney in violation thereof shall be deemed an unlawful practice and render the attorney subject to disciplinary action.

In *Hinerman v. Levin*, 310 S.E.2d 843 (1983)), the West Virginia Supreme Court of Appeals stated that the attorney's fee limitation set forth in West Virginia Code § 23-5-5 as cited in Paragraph 4 of this Petition is applicable to each final award.

In *Committee on Legal Ethics v. Coleman*, 377 S.E.2d 485 (1988), the West Virginia Supreme Court of Appeals cited with approval the holding in *Willingham v. Kral Music, Inc.*, 505 A.2d, 34, 36 (Del.Super.Ct. 1985), *aff'd without opinion*, 508 A.2d 72 (Del. 1986), in which the court held that an "award of compensation" upon which a workers' compensation claimant's attorney fee is based refers to any "favorable change of position or benefit" from a previously obtained position or benefit. In so stating, the Court in Coleman cited *State ex rel. Magun v. Sharp*, 103 S.E.2d 792 (1958), quoting Black's Law Dictionary with respect to the definition of an "award", which defined the same as "[t]he decision or determination rendered by arbitrators or commissioners, or other private or extrajudicial deciders, upon a controversy submitted to them; also the writing or documents embodying such decision." Coleman at 496. The Court explained: "The significance of *Magnum* for our purposes here is that it focuses attention upon whether the benefits, upon which an attorney's fee is based, were allowed in a final determination 'upon a controversy,' in which case one 'award' is involved and one attorney's fee is authorized." Id.

With regard to the specific facts in Coleman, the Court addressed the issue of whether the aforementioned workers' compensation statute limiting an attorney's fee is applicable to an award of PTD benefits in such a manner that the accrued benefits are not a separate award from the future benefits. Different from the issue presented herein, Coleman involved a workers' compensation attorney that obtained a PTD award on behalf of his client. The initial award of PTD resulted in the claimant being awarded accrued, or past-due, benefits, and simultaneously determined future benefits for life. The workers' compensation attorney interpreted the relevant statute herein as allowing for a twenty percent (20%) fee based upon the past-due benefits and a separate twenty percent (20%) fee for future benefits. The Court found the attorneys' fee withheld by the workers' compensation attorney was in excess of the statutory limit.

The legal issue presented in this Petition is different than the Coleman case inasmuch as we are dealing with NEW awards (whereas Coleman was attempting to charge essentially two (2) fees from the same award. Again, BLO is seeking a determination as to whether an attorney representing a claimant:

- (1) in settlement of medical benefits can obtain an attorney fee of twenty percent (20%) based upon the amount of the settlement of medical benefits on behalf of a claimant for the statutory maximum period of 208 weeks; and
- (2) where said claimant was granted a PTD award at some agency level, and later pursued and successfully obtained earlier onset dates for PTD awards through

either via litigation or appeal, can obtain an attorney fee of twenty percent (20%) based upon the additional PTD benefits granted because of said litigation or appeal not to exceed the statutory maximum period of 208 weeks per award.

BLO submits that West Virginia Code § 23-5-16, the sole statutory or regulatory provision governing workers' compensation attorneys fees, merely provides that no attorney's fee shall exceed twenty percent (20%) of any award of benefits to be paid for a period of two hundred eight (208) weeks. Thus, it would appear that the West Virginia Code does not explicitly provide for nor disallow an attorney representing a claimant to obtain an attorney fee of twenty percent (20%) based upon the amount of the settlement of medical benefits on behalf of a claimant not to exceed the statutory maximum period of 208 weeks.

The ambiguity with West Virginia Code § 23-5-16 is evident in the Coleman ruling. In fact, in that ruling, the Court concluded that partially as a basis of the ambiguity with the statute, that disciplinary sanctions against the attorney in Coleman were not appropriate. Instead, the Court only required that he pay restitution of the portion of the attorneys' fee charged it found in excess of the statute. In line with the Court's reasoning, BLO submits that the case law cited herein permits it to charge a twenty percent (20%) fee on the procurement of a settlement of a claim for medical benefits, as well as a twenty percent (20%) fee on a subsequent award of additional past-due PTD benefits which a claimant is awarded PTD benefits at some agency level, and later pursued and successfully obtained earlier onset date (and additional monies) for PTD awards through either via litigation or appeal.

With regard to permitting attorneys to charge a twenty percent (20%) fee on the settlement amount for medical benefits (again, not to exceed the statutory maximum period of 208 weeks), BLO would also note that such a finding by the Courts on these issues is important from a public policy standpoint. First, Court is well aware of the need for settlement in West Virginia workers' compensation claims. It is common knowledge that the Court is overwhelmed with workers' compensation appeals. Further, it would not appear that trend has lessened any despite reforms enacted over the past eleven (11) years. The Court even has its own mediation program which it enacted to encourage litigants to resolve differences for various reasons, including to lessen the workload of the Court. Not permitting an attorney to charge a twenty percent (20%) fee on the settlement amount for medical benefits (again, not to exceed the statutory maximum period of 208 weeks), would result in very few, if any workers' compensation settlements (unless, of course, said

claimant is unrepresented) due to the fact that such significant work is involved (see below) yet the attorney would not be compensated for such work. Because of that, claimants would have extreme difficulty obtaining the representation that he/she needed.

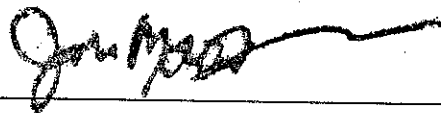
Also, BLO is sure that the Court is equally well aware that settling West Virginia workers' compensation cases on a full and final basis to include medical benefits involves a great deal of legal review, analysis, and negotiation. A workers' compensation attorney contemplating the settlement of a claim for medical benefits on behalf of a client must carefully consider the past treatment (including testing, medications, etc.) received and most often obtain medical opinions from providers as to anticipated future costs of treatment. Additionally, a workers' compensation attorney contemplating the settlement of a claim on behalf of a client for indemnity benefits must carefully consider all indemnity benefits paid to date and the likelihood that additional indemnity benefits could be paid out in the claim for additional award, and then also consider accounting concepts of present day value versus annuities, etc. Further, most of these cases require an additional requirement of obtaining the approval of the Center for Medicare and Medicaid Services (or CMS) since such cases involve Medicare beneficiaries. This is simply quite time consuming on the part of the attorney and requires a great deal of extra effort beyond the actual scope of representation.

Of course a workers' compensation attorney must always keep in mind Rule 1.5 of the West Virginia Rules of Professional Conduct with respect to any fees on medical settlements. Nevertheless, if an attorney is not permitted to charge a fee on the procurement of a settlement for medical benefits, then a claimant again will most likely have difficulty obtaining any representation, let alone effective representation. In fact, considering the amount of work involved and the potential liability with respect to settling a claim for medical benefits, BLO will not be able to entertain representing West Virginia workers' compensation claimants in settlements of a workers' compensation claim for medical benefits if it is not allowed compensation for services performed in procurement of the same.

WHEREFORE, and based upon the foregoing analysis, BLO respectfully requests that this Court grant its appeal and make specific legal findings, pursuant to West Virginia Code § 23-5-16, that:

- (1) the settlement of medical benefits amounts to a new and separate favorable change of position for the claimant, different from the claimant's previous position, thus entitling the attorney representing the claimant to obtain a new and separate attorney fee of twenty percent (20%) of the monetary amount of the settlement of medical benefits not to exceed the statutory maximum period of 208 weeks per award; and
- (2) the procurement of additional PTD benefits after initial award of PTD at some lower agency level either via litigation or appeal amounts to a new and separate favorable change of position for the claimant, different from the claimant's previous position, thus entitling the attorney representing the claimant to obtain a new and separate attorney fee of twenty percent (20%) of the monetary amount of the settlement of medical benefits not to exceed the statutory maximum period of 208 weeks per award.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jon Bowman", is written over a horizontal line.

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CERTIFICATE OF SERVICE

Service of the foregoing Appellant's Brief, was had upon the Appellee herein by mailing a true and correct copy thereof by regular United States mail, postage prepaid and properly addressed to its counsel of record, this 4th day of September 2008, as follows:

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